Mr. Edgar Joseph Jr. counsel for the appellant in his submission cited a number of cases to show the effect of misdirection as to the burden of proof. (See *Mat* v. *Public Prosecutor*[1] followed in the case of *Mahadi* v. *Public Prosecutor*[2]). In this case, it can be seen that before the president convicted the appellant, he stated that he accepted the prosecution case as true on a balance of probability.

In his grounds of judgment, the president further said:

"The burden of proof on the accused is as stated in *Public Prosecutor* v. *Yuvaraj*[3] but accused failed to prove on a balance of probability that the money came to be in his left trouser pocket as he had claimed."

In the first place, it seems clear to me that the learned president gravely misdirected himself as to the burden of proof on the prosecution. Proof on balance of probabilities has no application in criminal cases. I think it is settled law that in criminal cases, it is an essential principle that a criminal charge has to be established by the prosecution beyond all reasonable doubt. The learned president also misdirected himself as to the burden of proof on the defence when he said in his grounds of judgment that the burden of proof on the accused is as stated in *Public Prosecutor* v. *Yuvaraj, supra,* and that in the instant case there was a failure of the accused on the balance of probabilities to show how the money came to be in his left trouser pocket as he had claimed. In *Yuvaraj's* case, the question was whether a presumption under section 14 of the Prevention of Corruption Act, 1961 was rebutted by a defence which is reasonable and probable or whether it can be rebutted only by proof that defence is on such fact the existence of which is so probable that a prudent man would act on the supposition that it exists.

It was held that —

"upon the true construction of the Evidence Ordinance, 1950, and the Prevention of Corruption Act, 1961, there is no relevant difference between the two descriptions of the burden of rebutting the presumption of corruption which are contained in the question if 'the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable' is understood as meaning 'the burden of rebutting such presumption is discharged if the court considers that on the balance of probabilities the gratification was not paid or given and received corruptly as an inducement or reward as mentioned in section 3 or 4 of the Prevention of Corruption Act, 1961.'"

In the present case the question of presumption under section 14 does not arise. Different considerations might, however, arise if the appellant had been called upon for his defence on the original charge. Originally the appellant was charged in the capacity of councillor of the Town Council Klang, a member of a public body. It would therefore appear that the president has put too high a burden on the defence when in fact there was none. The president ought to have borne in mind that the fundamental principle in criminal cases is that the burden is throughout on the prosecution and it is not for the accused to prove his innocence. To entitle an accused to an acquittal, it is sufficient if after considering the defence, he has cast a doubt on the prosecution case.

After carefully considering the grounds of judgment, I have also found that the president had erred in failing to consider the defence. Thus in the circumstances of this case, I am unable to say what conclusion the president would have arrived at if he had properly directed his mind as to the burden of proof on the prosecution and the defence. I am also unable to say what conclusion the president would have arrived at if he had considered the defence.

For reasons which I have stated, I do not think I can allow the conviction to stand. The proper course to take in this case is to allow this appeal, set aside the conviction and sentence and order a retrial.

Appeal allowed. Retrial ordered.

Solicitors: *Joseph & Son.*

PONG KHEE KWEI v. TAN SAI KUY

[A.C.J. (Sharma J.) February 25, 1972]

[Ipoh — Civil Appeal No. 16 of 1971]

Landlord and Tenant — Agreement to let premises for rent — Whether created licence or tenancy — Whether a guile — Protection under Control of Rent Act, 1956 — Deposit paid more than statutory maximum — Whether illegal — Control of Rent Ordinance, 1956, s. 4(3) and Control of Rent Act, 1966, s. 10.

Landlord and Tenant — "Lease" and "licence" — Distinction between.

This was an appeal against the decision of the learned president, allowing the respondent/plaintiff's claim to possession of certain rent controlled premises.

The plaintiff's claim was based on an agreement dated September 22, 1965, which, it was alleged, only created a licence and not a tenancy of the premises in favour of the defendants. The defendants maintained that they were tenants and not mere licensees, and that the said agreement was only a guile to cover up what had been agreed upon between the parties. They therefore claimed the protection of the Control of Rent Act, 1966, and counterclaimed for the repayment of $5,000 which had been paid by them to the plaintiffs as a "deposit". No defence to the counterclaim was filed by the plaintiff at any time.

The learned president made an order for possession against the defendants and awarded the plaintiff damages. He dismissed the counterclaim with costs.

The defendant appealed.

The crucial question to be determined was whether the relationship between the parties was that of landlord and tenant or of a licensor and licensee.

Held, allowing the appeal: (1) the circumstances and conduct of the parties govern the nature and extent of their rights. The decisive consideration in determining such relationship is the intention of the parties. The court must look at the substance and reality of a transaction, not its form;

(2) the agreement of September 22, 1965, did not create a licence. In substance, it had the effect of a tenancy agreement;

(3) the appellants enjoyed a certain status of irremovability under the Control of Rent Act, 1966. The agreement relating to the deposit of $5,000 was illegal under section 10 of the Control of Rent Act, 1966, which allowed a maximum of an equivalent of 3 months rent to be received in advance by the respondent/landlord;

(4) therefore, the order of the learned president must be set aside, and judgment entered against the plaintiff for the sum of $5,000 and costs.

Observation on joints to be considered in determining whether the substance of a transaction creates a lease or a licence.

Cases referred to:-

(1) *Philpott* v. *St. George's Hospital* (1857) 6 H.L.C. 338, 349 per Lord Granworth L.C.
(2) *Equitable Life Assurance Society of the United States* v. *Head* [1914] A.C. 587, 595 per Lord Dunedin.
(3) *Mellis* v. *Shirley Local Board* (1885) 16 Q.B.D. 446, 451, 454.
(4) *Musgrove* v. *Chun Teeong Toy* [1891] A.C. 272.
(5) *Booker* v. *Palmer* [1942] 2 All E.R. 674, 676.
(6) *Cobb* v. *Lane* [1952] 1 T.L.R. 1037, 1039.
(7) *Errington* v. *Errington & Woods* [1952] 1 K.B. 290, 298.
(8) *Re Flynn* [1968] 1 All E.R. 49, 51.
(9) *Addiscombe Garden Estates Ltd.* v. *Crabbe* [1958] 1 Q.B. 513, 522.
(10) *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386, 1389.
(11) *Gorham (Contractors) Ltd.* v. *Fields* Unreported.
(12) *Forman* v. *Rudd* Unreported.
(13) *Marcroft Wagons Ltd.* v. *Smith* [1951] 2 K.B. 496.
(14) *Wilfred Isaac* v. *Hotel De Paris Ltd.* [1960] 1 W.L.R. 239.
(15) *Lee Pooi Chun* v. *Lee Kah Gee* [1971] 2 M.L.J. 67, 71.

MAGISTRATE'S CIVIL APPEAL.

N. H. Chan (*Pajan Singh Gill* with him) for the appellant.

F. C. Arulanandom for the respondent.

Cur. Adv. Vult.

Sharma J.: The plaintiff filed an action in the court of the Special President claiming (a) possession of premises No. 34 Cookman Street, Ipoh (hereinafter referred to as the premises) and (b) damages. The claim was based on an agreement dated the 22nd day of September, 1965 which, it was alleged, only created a licence and not a tenancy of the premises in favour of the defendants. The defendants maintained that they were the tenants and not merely the licensees of the premises and that the agreement dated the 22nd day of September, 1965 was only a guile or a mere cloak to hide what had actually been agreed upon between the parties. The defendants, having taken the stand that they were the tenants of the premises, claimed the protection of the Control of Rent Act, 1966. A sum of $5,000 had been paid to the plaintiff as a "deposit" and they counterclaimed for the repayment of this sum. No defence to the counterclaim was filed by the plaintiff at any time.

The learned president found for the plaintiff, made an order for possession against the defendants and awarded him damages at the rate of $500 per month from the 1st October, 1970 up to the date of delivery of possession. He also dismissed the counterclaim of the defendants with costs.

The plaintiff who is a dentist purchased the premises on the 5th March, 1965. On the 17th March, 1965 he entered into an agreement with the defendants whereby the premises were demised to the defendants for a period of one year with a provision for the renewal of the lease each year for a further period of 4 years at a monthly rental of $500. A deposit of $5,000 was paid to the plaintiff under this agreement and he undertook to repay this sum to the defendants on their "surrendering, quitting and giving up peaceful vacant possession of the whole of the said premises and returning all the furniture." The agreement further provided that "notwithstanding the Control of Rent Ordinance, 1956 or any modification or any similar measure coming into force" the defendants would voluntarily quit the premises upon termination or determination of the agreement. The agreement was drawn by a solicitor. The parties were seeking to contract themselves out of the statute or to waive its effects. It is not necessary for the purposes of this appeal to go into the question whether this could or could not be done. (However see *Philpott* v. *St. George's Hospital,*(1) *Equitable Life Assurance Society of the United States* v. *Read,*(2) *Mellis* v. *Shirley Local Board*(3) and *Musgrove* v. *Chun Teeong Toy*(4)).

The agreement contemplated a tenancy of the premises to enable the defendants to carry on the business of a restaurant and a coffee shop. The plaintiff was to apply for a licence from the Municipality and this licence was issued in the name of the plaintiff in September 1965. The agreement dated the 17th day of March, 1965 was then cancelled and the parties entered into a fresh agreement on the 22nd day of September, 1965. The plaintiff is referred to as the "owner" and the defendants as the "contractors" in this agreement. The defendants "run and control" the business under this agreement and the plaintiff has no right "in any way to interfere with the running and operation" of the business by the defendants. All the profits and losses belong to and are the responsibility of the defendants. The defendants began to pay a "contract fee" of $500 per month instead of a "rent" of $500. The plaintiff now reserved to himself an area of about 5' x 8' "to run and operate an office" under the staircase to the 3rd floor (This area was to be partitioned). The other clauses of the second agreement need not be gone into as they do not very materially tend to affect the question of the intention of the parties or throw any light as to the necessity for entering into that agreement. The plaintiff's assertion was that the second agreement was entered into only at the request and on the initiative of the defendants. The second defendant, however, asserted that the second agreement was entered into at the sole suggestion of the plaintiff. There was no cross-examination of either the plaintiff or the second defendant on this point and the learned president has not dealt with the same in his grounds of judgment. The plaintiff gave four reasons for the cancellation of the first and the execution of the second agreement. They were:

(1) The first agreement did not expressly state that the defendants could use the first floor of the premises as a restaurant and so the defendants desired that this doubt should not be left shrouded in any ambiguity.
(2) The defendants feared that as the eating shop licence was in the name of the plaintiff and as he was registered with the Registrar of Businesses as the proprietor of the business, he could demand accounts from the defendants. The defendants wanted that the plaintiff should have no right to ask for accounts.
(3) The defendants desired that the agreement should make it clear that they were running the business

in the premises under the name of the plaintiff.

(4) The licence granted by the Municipality to the plaintiff was liable to be cancelled if it was discovered that the plaintiff had no connection with the business and that the defendants would thereby lose the deposit of $5,000. The defendants did not want this to happen.

The agreement was renewed from year to year and was finally to expire on the 30th September, 1970.

The crucial question which has to be determined in this appeal is whether the real relationship between the parties was that of a landlord and tenant or of a licensor and licencee. In doing so all the relevant circumstances and the conduct of the parties have to be considered and analysed. As has been so often said the decisive consideration in determining such relationship is the intention of the parties. The court must look at the substance and reality of a transaction, not its form. A document may be executed with no intention that it should be acted upon in the manner suggested in it. The real intention may be otherwise. The document in such a case is a mere show.

In *Booker* v. *Palmer*,[5] Lord Greene M.R. said:

"Therefore, what we have to decide is whether there was any evidence upon which a tenancy between the respondent and Mrs. Goldsmith could be inferred. In my opinion, there is no evidence from which any such inference could be drawn."

The passage indicates that Lord Greene placed reliance upon "*evidence*" from which an "*inference*" could follow. Lord Greene went on to say:

"Whether or not parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created in the tenant and certain mutual obligations arise by implication of law, must in the last resort be a question of intention."

In *Cobb* v. *Lane*,[6] Somervell L.J. said:

"But the modern cases (by which we are bound) establish that, if there is evidence as to the circumstances in which the person claiming to be a tenant at will went into occupation, those circumstances must be considered in deciding what the intention of the parties was."

In both these cases there was insufficient oral evidence before the courts and therefore the courts seem to be at pains to avoid imputing any intention to the parties. Somervell L.J. said in this regard:

"There is no inference of law which compels one to say that a man must be regarded as a tenant at will because one finds him and his wife and daughter living in a house as if it were their home."

In *Errington* v. *Errington and Woods*,[7] Denning L.J. (as he then was) after discussing a number of cases said:

"The result of all these cases is that, although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only."

The *circumstances* and *conduct* of the parties thus govern the *nature* and *extent* of their rights. In finding out the intention of the parties all that the court can do is to draw inferences from their acts or words. Megarry J. in the case of *Re Flynn*[8] said as follows:

"With the evidence in the form directed by Ungoed-Thomas J., I am satisfied, subject to one qualification, that the evidence now before me suffices to determine the issue and that it is unnecessary to direct further enquiries. In one sense there is no end to the evidence that may be adduced; for the whole of a man's life and all that he has said and done, however trivial, may be prayed in aid in determining what his intention was at any given moment of time. The state of a man's mind may be as much a fact as the state of his digestion; but, as Harman L.J. is reputed to have observed, 'the doctors know precious little about the one and the judges know nothing about the other.' The difficulty is as old as the Year books .... All that the court can do is to draw inferences from what has been said and done; and in doing this, too much detail may stultify."

In the recent cases dealing with the distinction between leases and licences emphasis is laid on the objective approach to the problem. The objective approach seeks to find out the real character of the transaction by viewing the facts objectively.

In *Addiscombe Garden Estates Ltd.* v. *Crabbe*,[9] Jenkins L.J. after stating the facts said:

"As to the first question — whether the so-called licence of April 12, 1954, in fact amounted to a tenancy agreement under which the premises were let to the trustees — the principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that a document described as a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence....

[His Lordship read the agreement of April 12, 1954, and continued:] First, one must observe that the document is described by the parties as a licence. Secondly, one must observe that the draftsman has studiously and successfully avoided the use either of the word 'landlord' or the word 'tenant' throughout the document. The nearest to the use of the word 'tenant' is the reference to 'tenantable repair' in clause 4, subclause (iii); so that if the question depended on the label attached to the document, one would be constrained to say that this, in accordance with its label, was a licence. But if it is right (as I have no doubt it is) to look at the substance of the matter, I think that a different conclusion inevitably ensues. ... There is nothing in the character of the premises as shown on the plan to make them an unfit subject of a tenancy agreement as distinct from a licence.

Looking at the substance of the matter, what do the grantees get? By clause 1 they are licensed and authorised 'to enter upon use and enjoy' the items mentioned; and it seems to me that those words, taken together, are apt to give to the tenant something in the nature of an interest in the land. ... There is thus a term certain which would be appropriate to the grant of a tenancy.... In all but name, that appears to me to be a rent or reddendum in consideration of the right to 'enter upon use and enjoy' the premises which is granted by clause 1.

So far, it seems to me that the rights expressed to be conferred on the grantees are, in substance, the rights of a tenant as distinct from the rights of a mere licensee; .... The significance of that is that it should have been thought

necessary expressly to prohibit the grantee from doing certain things which quite plainly, if they were mere licensees, they would have no right or power to do.... The importance of that is that it shows that the right to occupy the premises conferred on the grantee was intended as an exclusive right of occupation, in that it was thought necessary to give a special and express power to the grantors to enter. The exclusive character of the occupation granted by a document such as this has always been regarded, if not as a decisive indication, at all events as a very important indication to the effect that a tenancy, as distinct from a licence, is the real subject-matter of a document such as this....

In subclause (xii) there is provision 'to deliver up the said premises at the termination of this licence in a condition consistent with the foregoing provisions.' 'To deliver up' seems to me an expression more appropriate to a tenant with an interest in the land than to a person who has a mere contractual right to be on the land; it is an expression universally used, I think, in all tenancy agreements and leases. The provision as to insurance points in the same direction; ...."

(The underlying is mine to emphasize the objective test suggested by Jenkins L.J.).

In *Facchini* v. *Bryson*,[10] Denning L.J., (as he then was) after referring to *Errington* v. *Errington*,[7] *Gorham (Contractors) Ltd.* v. *Fields*,[11] *Forman* v. *Rudd*[12] and *Cobb* v. *Lane*[6] said:

"In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all.... Their relationship is determined by the law and not by the label which they choose to put on it:... It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven — I will not in these days say a coach and four — but an articulated vehicle."

The following considerations seem to be deducible from the various cases dealing with the distinction between a lease and a licence. In order to find out the substance of the transaction:

(1) One should try to find out and know the nature and the extent of the grant. What is it that the grantor has given and what is it that the grantee in substance has been granted? This fact can be ascertained from the intrinsic evidence of the document or documents as well as from other admissible extrinsic evidence.

(2) The circumstances at the time the parties entered into the transaction should be ascertained. Do the circumstances point out to the fact that the grantee required a lease and not a licence and that the grantor would have but for the Control of Rent Act granted an interest in the property in consideration of the rent. The intention should be judged objectively and not subjectively. The promisor should be taken to intend what a reasonable man receiving the promise would believe him to intend. For the answer to the question whether the grantor would have given a lease if the Control of Rent Act had not been in force, the answer should be found in the evidence relating to the circumstances in which the transaction was entered into.

(3) What does the subsequent conduct of the parties indicate? (See *Marcroft Wagons Ltd.* v. *Smith*[13]).

(4) Has any attempt to evade the Control of Rent Act been made? Whenever the courts are confronted with this question they decide the matter by applying the principle of finding out the real character of the transaction. *Megarry* (Tenth Edition) at pages 55-60 has this to say:

"If landlords could escape the control of the Acts by the simple expedient of granting a licence in place of a tenancy, the Acts could easily be avoided. The fact that a licence is outside the Acts may be some ground for inferring that the grantor never intended to grant a tenancy, yet it is uncertain how far the grantor's intention will ultimately prevail. On one view, if the intention of the grantor, accepted by the grantee, is to create a licence and no tenancy, it would be wrong for the court to extract from the grantor an estate or interest in land in the teeth of the intention of the parties, at all events if the words or document by which the transaction was effected are apt for a licence and not for a tenancy. On the other hand, if by being sufficiently careful in their drafting and explicit in their refusal to grant tenancies landowners could escape the Acts with ease, the social consequences would be grave. There have hitherto been enough flaws in the drafting or uncertainty in the surrounding circumstances to enable the courts to hold that tenancies have been created in all the reported cases where such a result seemed proper. The court will certainly scrutinise with great care any document or transaction which has the avoidance of the Acts as its sole or main object.

One day, however, the court will have to meet the challenge of well-drafted licences of a row of suburban villas. It is difficult to see how the challenge can be met save by evolving some new doctrine that, on grounds of public policy or otherwise, a purported licence will in fact create a tenancy if the circumstances require this, e.g. if, but for the Rent Acts, it is probable (or, perhaps, virtually certain) that a tenancy and not a licence would have been created."

The first agreement dated the 17th day of March, 1965 recites that the plaintiff was "desirous of letting" and the defendants "desirous of renting" the premises at a monthly rental of $500. It is thus clear that the original intention of the plaintiff unmistakably was to let out the premises to the defendants. The plaintiff was and is a dentist and he could not have conducted the business of a coffee shop himself. He had in the same agreement indicated that he would "hand over the tenancy" of the premises on or before the 31st day of July, 1965 so that the defendants could carry on the business of an eating and a coffee shop there. He had applied for a licence in his own name and it is or should be plain that he hoped to get that licence before the 31st July, 1965. Clause 14 of the same agreement is a clear attempt to evade the provisions of the Control of Rent Ordinance, 1956. That again indicates that at the back of the mind of the plaintiff was the desire to let out the premises, yet at the same time he was anxious to save himself from the effects of the Control of Rent Ordinance, 1956. The licence was duly issued by the Ipoh Municipality in September, 1965 and it is evident that the defendants could not commence business until that date. It is again very significant that the second agreement dated the 22nd day of September, 1965 came to be executed without a word being mentioned in it about the cancellation of the earlier agreement. The plaintiff's own admission on the point is that he did not desire any

change and that the change was necessitated only to meet the fears of the defendants. I need not repeat the four reasons which the plaintiff gave for the cancellation of the first agreement and the execution of the second agreement. Suffice it for me to say that if what he was telling the court had any ring of truth, the solicitor who drafted the second agreement would in some way have either incorporated those averments or fears of the defendants or provided against them. The premises were to be used as a restaurant and a coffee shop with a licence in the name of the plaintiff. There was in fact nothing which the defendants could generally be afraid of under the first agreement. The learned president in his grounds of judgment said:

"The plaintiff gave four reasons why the defendants themselves desired to have the second agreement drawn up, and it was as a result of their persuasion that this agreement was entered into subsequently in the office of solicitor Mr. Too Heng Lip. I think the reasons given were, in the circumstances under which both defendants were to be allowed to run and control the business, valid ones."

The learned president should have done better if he had stated why he came to the conclusion that those four reasons were valid and how the position of the defendants had in any way improved or become better by the execution of the second agreement. If the defendants in fact did use any "persuasion" to alter the terms of the first agreement such "persuasion" could not have resulted in the change of the recital in the second agreement. The recital in the second agreement is that the plaintiff *at the request of the defendants* had agreed to *allow* the defendants to run and control the business of an eating shop which was registered with the Registrar of Businesses in the name of the plaintiff and in respect of which a licence had also been issued in the plaintiff's name. It is with regret that I have to say that the learned president did not adequately apply his mind to ascertain why it became necessary to have the second agreement. He again failed to consider and analyse what in effect was the substance of the second agreement in the light of the surrounding circumstances in which the two agreements were executed. The plaintiff was interested in the rent of $500. This was unequivocally stated to be "rent" payable by the defendants in the first agreement. The expression "rent" was changed to "contract fee" in the second agreement. One does not look at the mere label in a document but at its real substance. What is the substance of the second agreement? The premises with the exception of a space of about 5' x 8' (which space had to be partitioned off) was to be in exclusive possession of the defendants for the purpose of carrying on a business which to all intents and purposes and in fact was to be run by them as their exclusive concern. The possession of the premises was in the absence of any breach of the conditions to remain with them for a period of one year in the first instance. The amount payable for the use and occupation was fixed in the sum of $500 per month. They were to employ their own workmen and provide for their insurance against workmen's compensation. They were to be responsible for the payment of all taxes in respect of the employees or the business. They were to pay for water and electricity. The defendants agreed to pay the sum of $500 per month prescribed under the agreement whether they carried on the business or not and whether they made any profit out of it or sustained a loss therein. The defendants had the exclusive possession of the premises. They, *prima facie*, have to be regarded as tenants unless there are circumstances which may negative the intention of a tenancy having been created in their favour. I find no such evidence other than the mere change in the phraseology of the second agreement, a phraseology which on first reading may seem appropriate to a licence only. It is, however, the substance of the document and not its form which is to be preferred in determining the question. The learned president again failed to consider the very important question whether the defendants were in exclusive possession. The first agreement put the defendants in exclusive possession and the second agreement did not seek to change or alter their right to the exclusive possession of the premises. That right remained untrammelled and free from any control from the plaintiff. The exclusive possession of the defendants was not subject to any direction from the plaintiff.

Reliance was placed upon the case of *Wilfred Isaac* v. *Hotel De Paris Ltd.*[14] by counsel for the respondent. This case was also cited before the learned president. In that case Lord Denning said:

"The position at this time, as the trial judge found, was that the defendant was installed at the Parisian Hotel for the purpose of managing a night bar on the company's behalf."

There was the clear finding by the trial court in *Wilfred Isaac's* case[14] that the defendant was managing the business on behalf of the company. (See *Lee Pooi Chun* v. *Lee Kah Gee*[15]). The defendants in the present case were not managing the restaurant on behalf of the plaintiff but for their own benefit and to the exclusion of the plaintiff.

The finding of the learned president "that the second agreement dated the 22nd day of September, 1965 was anything but a tenancy agreement" is totally untenable in law having regard to the clear intention of the parties as expressed in the first agreement, their conduct and the desire of the plaintiff to circumvent the provisions of the Control of Rent Ordinance, 1956. The learned president did no more than glimpse and glance at the surface and the outer form and appearance of that agreement. He should have made an effort to see deeper into it and to scan it. It required a close scrutiny and examination and a comparison with the earlier agreement. Its true character could only be seen by removal of the cover or label below which lay its reality. In my view the second agreement did not for the reasons I have already given create a licence. It was in fact no more than a presentation of the first agreement in a new garb. The substance of the two agreements remains the same. It continued to have the effect of a tenancy agreement.

The defendants had deposited with the plaintiff the sum of $5,000 under the first agreement on the 15th day of March, 1955 [see temporary receipt (Exhibit P.1)] two days prior to the execution of the agreement dated the 17th day of March, 1965. This sum having remained with the plaintiff even under the

second agreement, the defendants filed a counterclaim against the plaintiff for the return of the said sum. No defence to the counterclaim was filed by the plaintiff. Order 10, rule 6 of the Subordinate Courts Rules, 1950 provides:

"Where any defendant counterclaims, the plaintiff shall, if he desires to defend such counterclaim, file and cause to be served on the counterclaimant a defence to counterclaim within such time as the court shall direct."

In spite thereof the learned president dismissed the counterclaim with costs. It is true that the plaintiff had in paragraph 6 of his statement of claim stated:

"6. The plaintiff on the 30th day of September, 1970 forfeited the sum of $5,000 paid as deposit under the said agreement for the aforesaid breach."

That fact, however, was not at all material to the claim of the plaintiff for possession of the premises or for award of damages. By dismissing the counterclaim the learned president not only allowed the plaintiff to retain the sum of $5,000 as an amount forfeited to him but, in addition, gave judgment for the plaintiff awarding him damages at the rate of $500 per month as from the 1st day of October, 1970 until delivery of possession. No part of the plaintiff's claim sought a declaration that he was entitled to forfeit the sum of $5,000 as a genuine pre-estimate by the parties of damages for any breach of contract. I have already held that the tenancy rights of the defendants continued even under the second agreement and consequently the contractual rent of the premises was $500 per month. The defendants enjoyed a certain status of irremovability under the Control of Rent Act, 1966. An equivalent of 3 months rent alone could at the maximum be received in advance by the plaintiff under section 4(1) of the Control of Rent Ordinance, 1956. The deposit of $5,000 received by the plaintiff was totally unauthorised and was recoverable by the defendants. In fact the agreement relating to the deposit of $5,000 was illegal under section 4(3) of the Control of Rent Ordinance, 1956. The provisions of section 4 of the Control of Rent Ordinance, 1956 are practically reproduced in section 10 of the Control of Rent Act, 1966. Apart from the question that this sum was received in contravention of the provisions of the Control of Rent Ordinance, 1956 and even if it was considered that the learned president was right in deciding that the second agreement created not a lease but a licence in favour of the defendants, he should have considered the provisions of section 75 of the Contracts Ordinance, 1950. This he failed to do. The clauses relating to the forfeiture of $5,000 were obviously in the nature of a penalty. The question however is otiose as I have already held that the plaintiff had no right whatsoever to ask for or receive any deposit unless such deposit was to be treated as advance payment of 3 months rent and did not exceed it.

The appeal is allowed. The order of the learned president is set aside. The plaintiff's claim is dismissed with costs and on the defendant's counterclaim, there will be judgment against the plaintiff for the sum of $5,000 and costs. Both the defendants had filed a notice of appeal but it was only the first defendant who proceeded on with this appeal. The appellant will have the costs of this appeal but both the defendants will have the costs of the action as well as their counterclaim before the learned president.

Appeal allowed.

Solicitors: *Cheang Lee & Ong; Arulanandom & Co.*

YAP YEW YEE v. SUBRAMANIAM & ANOR.

[O.C.J. (Mohamed Azmi J.) February 26, 1972]

[Kuala Lumpur — Civil Suit No. 1794 of 1968]

Negligence — Road accident — Road junction — Taxi proceeding along major trunk road — Motorcycle crossing from minor estate road — Collision — Taxi driver not to blame for accident.

This was an action for damages against the owner of a motor taxi and the second defendant its driver for damages resulting from a collision between the motorcycle driven by the plantiff and the motor taxi. At the time of the accident the motor taxi was proceeding along a major trunk road. The plaintiff's motorcycle suddenly emerged from a minor estate road on the left hand side from a distance of about 30' away and the accident took place.

Held: (1) the taxi driver, on the main trunk road was entitled in the absence of any traffic sign to warn him of any danger ahead or of any indication by the motor cyclist coming from a minor side road to assume that the motor cyclist would stop at the junction and give him the right of way. In the circumstances there was nothing he could do to avoid the accident;

(2) both on the facts and the law, the plaintiff was wholly to blame. The folly of the plaintiff in entering onto the main road without stopping at the junction, cannot be regarded as reasonably foreseeable.

Cases referred to:-

(1) *Lang* v. *London Transport Executive & Anor.* [1959] 3 All E.R. 609.

(2) *K.R. Taxi Service Ltd. & Anor.* v. *Zaharah & Ors.* [1969] 1 M.L.J. 49 at p. 53.

(3) *Wan Siew Lum* v. *Mohd. Ariffin* [1965] 1 M.L.J. xii.

CIVIL SUIT.

T. K. Tang for the plaintiff.

G. Vadiveloo for the defendants.

Cur. Adv. Vult.

Mohamed Azmi J.: On August 30, 1964, a collision occurred between a motorcycle ridden by the plaintiff and a motor taxi driven by the second defendant, along the Kuala Lumpur/Ipoh main trunk road. The plaintiff now claims against the owner and the driver of the motor taxi for damages for personal injuries and loss sustained by him as a result of the accident.

The case for the plaintiff as contained in paragraphs 3 and 4 of the statement of claim is that:

"On or about the 30th of August 1964, at about 2.10 p.m. the plaintiff was travelling along Jalan Sungei Gapi Estate and stopped at the junction between Jalan Sungei Gapi Estate and the Main Road from Kuala Lumpur to Kuala Kubu Bharu. While the plaintiff was waiting at the junction as aforesaid, the second defendant so negligently drove the said motor taxi along the Main Road... that it collided with the plaintiff's said motorcycle..."

The plaintiff testified in evidence in chief that on that day he was riding his motorcycle from Sungei